

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**THE VILLAGE AT DEER CREEK  
HOMEOWNERS ASSOCIATION, INC.**

**RESPONDENT,**

**v.  
MID-CONTINENT CASUALTY  
COMPANY**

**APPELLANT.**

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DOCKET NUMBER WD76191 Consolidated with WD76192

DATE: April 1, 2014

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Appeal From:

Jackson County Circuit Court  
The Honorable Marco A. Roldan, Judge

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Appellate Judges:

Division One: Cynthia L. Martin, Presiding Judge, Mark D. Pfeiffer, Judge and Karen King Mitchell, Judge

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Attorneys:

Scott C. Long and John R. Weist, Overland Park, KS, for respondent.

Vincent F. O'Flaherty and Levon G. Hovnatanian, Kansas City, MO, for appellant.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
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**RESPONDENT,**

**v.  
MID-CONTINENT CASUALTY  
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No. WD76191 Consolidated with WD76192

Jackson County

Before Division One: Cynthia L. Martin, Presiding Judge, Mark D. Pfeiffer, Judge and Karen King Mitchell, Judge

Mid-Continent Casualty Company appeals a judgment entered in favor of The Village at Deer Creek Homeowners Association, Inc. in an equitable garnishment proceeding tried to the court. Because we conclude that a judgment awarded to the Association against Mid-Continent's insured, Greater Midwest Builders, Ltd. was for "property damage" caused by an "occurrence" as defined in Mid-Continent's policies, and because we conclude that the trial court did not abuse its discretion in denying Mid-Continent leave to file an amended answer, we affirm the trial court's judgment in part, and exercise our discretion in accordance with Rule 84.14 to vacate and recalculate the damages awarded to the Association.

**Affirmed in part, vacated and modified in part**

1. In an equitable garnishment proceeding, the Association as the judgment creditor bears the burden of proving (i) that it obtained a judgment against Mid-Continent's insured, (ii) that Mid-Continent's policies covered the damages awarded in the judgment, and (iii) that Mid-Continent's policies were in effect when the damages occurred.

2. Substantial evidence supports the conclusion that components of defectively installed exterior cladding systems on 137 townhomes were damaged by water intrusion, and that removal of some or all of the exterior cladding system will be necessary to repair water intrusion damage caused "behind the walls" of the townhomes. As a result, the trial court did not error in determining that the judgment against Mid-Continent's insured awarded the Association "property damages" as that term is defined in Mid-Continent's policies.

3. Mid-Continent contends that complaints from homeowners about water leaks put its insured on notice and that water damage to 52 townhomes thereafter constructed cannot be characterized as an "occurrence." Mid-Continent's argument is negated by the necessary findings in the judgment awarded the Association against the insured, as that judgment found the insured negligent for failing to investigate and discover the cause of the water leaks. Mid-Continent's argument constitutes an improper collateral attack on the underlying judgment.

4. Even if Mid-Continent could contest the finding of its insured's negligence, substantial evidence was presented in the equitable garnishment trial from which the trial court could conclude that the insured was not aware that reported water leaks were a result of pervasive defects in the manner in which the exterior cladding system was being installed.

5. The trial court's denial of Mid-Continent's motion for leave to file an amended answer to assert an additional affirmative defense shortly before trial was within the discretion of the trial court and is presumed correct. We have reviewed the record, and cannot find that the trial court clearly and palpably abused its discretion.

6. No evidence supports apportioning 82/137 of the judgment against the insured to Mid-Continent. Instead, 77/137 of the underlying judgment should have been apportioned to Mid-Continent. We exercise our discretion pursuant to Rule 84.14 and vacate and modify the calculation of damages awarded the Association against Mid-Continent.

Opinion by Cynthia L. Martin, Judge

April 1, 2014

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